TECK HONG DEVELOPMENT SDN BHD

v.

TOH CHIN ANN

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: J-02-1021-2007]
23 APRIL 2008

LAND LAW: *Caveat - Private caveat - Removal of - Grounds on which caveat entered - Interest of title - Order for sale - Whether valid - Whether Land Administrator functus officio - Whether there was any defect in certificate of sale*

LAND LAW: *Sale of land - Caveat, application for removal of - Private caveat - Grounds on which caveat entered - Interest of title - Order for sale - Whether valid - Whether Land Administrator functus officio - Whether there was any defect in certificate of sale*

LAND LAW: *Land Administrator - Rights, powers of jurisdiction - Sale of land at auction - Amendment to memorandum of contract - Whether merely clerical in nature - Whether went to jurisdiction of Land Administrator's power*

One Pua Gen Choo ('deceased'), at all material times the registered proprietor of certain property held under a grant in Johor ('subject property'), had charged the title to the subject property to a bank as security for a loan from the bank. Upon her subsequent default in repaying the loan, the bank applied for an order for sale from the Land Administrator ('LA'). The subject property was auctioned and one Kerk Chee Kian, the director of the instant appellant, made a successful bid. Later still, the appellant paid the full purchase price and a certificate was issued to it pursuant to s. 265(4) of the National Land Code ('Code'). In the meantime, the respondent claiming to be the purchaser of the subject property entered a private caveat against its title. The appellant then applied to the High Court under s. 327 of the Code to have that caveat removed, its failure resulting in the present appeal. In opposing this appeal, the respondent raised two

A main grounds: (i) the caveat must remain because the order for sale made by the LA was challenged under separate proceedings instituted in December 2006; and (ii) the deposit that was paid at the auction was not by the appellant, but by its director. The memorandum of contract was originally made in favour of the
B director and was later amended to reflect the appellant as the purchaser. It was contended that the LA was *functus officio* and the sale was therefore bad.

Held (allowing the appeal)

C **Per Gopal Sri Ram JCA delivering the judgment of the court:**

(1) The respondent's caveat was not based on the ground advanced before this court. In the Form 19B employed by the respondent to enter his caveat, he relied on a sale and
D purchase agreement he entered into with one Hau Sok Ngo, a beneficiary of the deceased's estate. The caveat was not grounded on the fact that the order for sale was invalid. A caveator is bound by the grounds he or she sets out in the application in Form 19B for the entry of the caveat, and if
E the grounds disclosed in Form 19B do not disclose a caveatable interest, then *cadit quaestio*. *Luggage Distributors Sdn Bhd v. Tan Hor Teng* (foll). (para 4)

(1a) In the present case, the sale and purchase agreement on
F which the respondent relied to sustain his caveat in truth and fact conferred no interest of title on him. The vendor with whom he made the contract was not the registered proprietor of the land. She accordingly had no title to pass. Further, the mere payment of the deposit for purchase of a
G property does not render a purchaser a *bona fide* acquirer of the property. *Doshi v. Yeoh Tiong Lay* (foll). Also, the respondent conceded that the sale and purchase agreement in question was entered into after the LA made his order for sale. Once the order for sale had been made, any attempt
H to deal with the subject property by way of private treaty was futile. The order of sale put the property out of the hands of the deceased's estate. (paras 5 & 6)

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(2) The amendment to the memorandum of contract was merely clerical in nature, and did not go to the jurisdiction of the LA's power. *M&J Frozen Food v. Siland* (dist). This was a case where a certificate of sale had been issued to the appellant. That certificate placed the appellant in the position of a registered proprietor by virtue of s. 267 of the Code. Since the respondent was unable to show any defect in the certificate so issued and had based his claim for a caveat on an unsustainable ground, the certificate must stand. (paras 7 & 8)

(3) For the reasons already given, this court was unable to agree with the orders made by the High Court. This was a case where there was no caveatable interest, no serious question to be tried and one in which the balance of convenience clearly favoured the appellant. (para 9)

[Order of High Court set aside. Land Administrator directed under s. 417 Land Code to remove respondent's private caveat.]

Bahasa Malaysia *Translation Of Headnotes*

Seorang Pua Gen Choo ('simati'), adalah pada semua masa material pemilik berdaftar hartanah yang dipegang di bawah satu geran di Johor ('harta tersebut'), di mana beliau telah menggadaikan harta tersebut sebagai jaminan bagi satu pinjaman yang diberikan oleh bank. Beliau gagal membayar balik pinjaman, dan bank telah memohon perintah jualan dari Pentadbir Tanah ('PT'). Harta tersebut kemudian dilelong dan seorang Kerk Chee Kian, pengarah perayu di sini, berjaya membidanya. Berikutnya, perayu telah membayar harga belian dan satu sijil telah dikeluarkan kepadanya di bawah s. 265(4) Kanun Tanah Negara ('Kanun'). Sementara itu, responden, yang mengaku telah membeli harta tersebut, telah memasukkan kaveat persendirian terhadapnya. Perayu memohon kepada Mahkamah Tinggi di bawah s. 327 kanun untuk menyingkirkan kaveat, dan memfail rayuan di sini apabila permohonan tersebut ditolak. Responden telah membantah rayuan, dan untuk itu telah membangkitkan dua alasan utama, iaitu: (ii) kaveat masih berdiri tegak kerana perintah jualan yang dibuat oleh PT telah dicabar di dalam prosiding berlainan yang difailkan pada Disember 2006; dan (ii) deposit yang dibayar semasa

lelongan tidak dibayar oleh perayu, tetapi oleh seorang pengarahnya. Memorandum kontrak pada mulanya dibuat untuk manfaat pengarah tersebut, tetapi kemudian diubah bagi mencerminkan perayu sebagai pembeli. Ianya dihujahkan bahawa PT sudah pun *functus officio* dan penjualan dengan itu adalah batal.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Kaveat responden tidak diasaskan kepada alasan-alasan seperti yang dikemukakan di hadapan mahkamah ini. Di dalam Borang 19B yang digunakan oleh responden bagi memasukkan kaveatnya, beliau bergantung kepada perjanjian jual beli yang dimeterai oleh Hau Sok Ngo, seorang waris pusaka simati. Kaveat tidak diasas kepada fakta bahawa perintah jualan tidak sah. Seseorang pengkaveat adalah terikat dengan alasan dan sebab yang dinyatakan di dalam permohonan Borang 19Bnya, dan jika alasan yang diberikan di dalam borang tersebut tidak mendedahkan sebarang kepentingan yang boleh dikaveat, maka ia adalah *cadit quaestio*. *Luggage Distributors Sdn Bhd v. Tan Hor Teng* (diikuti).

(1a) Perjanjian jual beli yang dijadikan pergantungan oleh responden bagi menyokong kaveatnya tidak mendedahkan apa-apa kepentingan yang boleh dikaveat. Penjual yang beliau berkontrak bukan pemilik berdaftar tanah dan dengan itu tidak mempunyai apa-apa hakmilik untuk diserahkan. Selain itu, membuat bayaran deposit semata-mata bagi hartanah tersebut tidak menjadikan seseorang pembeli itu pemilik *bona fide* hartanah. *Doshi v. Yeoh Tiong Lay* (diikuti). Selain itu, responden juga mengakui bahawa perjanjian jual beli berkenaan telah dimasuki selepas PT membuat perintah jualannya. Sebaik perintah jualan dibuat, sebarang percubaan untuk berurusan dengan harta tersebut melalui triti persendirian adalah sia-sia. Perintah jualan telah menyebabkan harta tersebut terlepas dari genggaman pusaka simati.

(2) Pindaan kepada memorandum kontrak hanya berbentuk clerical dan tidak menjejaskan bidangkuasa PT. *M&J Frozen Food v. Siland* (dibezakan). Ini adalah kes di mana sijil telah pun dikeluarkan kepada perayu. Sijil tersebut meletakkan

perayu sebagai seorang pemilik berdaftar berdasarkan s. 267 Kanun. Oleh kerana responden gagal menunjukkan sebarang kecacatan pada sijil yang dikeluarkan selain dari mengasaskan tuntutan kaveatnya atas sebab-sebab yang tidak dapat dipertahankan, maka sijil adalah sah.

(3) Atas alasan-alasan yang diberi, mahkamah tidak dapat bersetuju dengan perintah-perintah mahkamah Tinggi. Ini adalah kes di mana tidak terdapat kepentingan yang boleh dikaveat atau persoalan penting yang boleh dibicarakan sementara imbangan keselesaan pula jelas berpihak kepada perayu.

[Perintah Mahkamah Tinggi diketepikan. Pentadbir Tanah diarah mengeluarkan kaveat persendirian responden di bawah s. 417 Kanun.]

Case(s) referred to:
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(foll)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(foll)***
M & J Frozen Food v. Siland [1994] 2 CLJ 14 SC ***(dist)***
Morland v. Hales and Somerville [1911] 30 NZLR 201 ***(refd)***
Mui Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***

Legislation referred to:
National Land Code, ss. 265(4), 267, 327, 417

For the appellant - Wong Kim Fatt (Wong Boon Lee & Mohd Farid Abdul Aziz with him); M/s KH Tan & Co
For the respondent - Manian K Marappan; M/s Manian K Marappan & Co

[Appeal from High Court, Muar; Originating Summons No: 24(L) 834-2006]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This morning we have before us a motion for extension of time to file a record of appeal herein. Having regard to the urgency of the matter; the subject matter being a private caveat

A subsisting against the title to land; this court directed the motion for extension of time to be treated as the appeal proper with the consent of both parties of the appeal. Compliance with the Rules of the Court of Appeal 1994 was dispensed with.

B **[3]** The facts relevant to this appeal are as follows. Pua Gen Choo (f) (now deceased) was at all material times the registered proprietor of the property held under Grant 1365 for Lot no 3975, in the Mukim of Jalan Bakri Daerah Muar, Johor ("the subject property"). She had borrowed money from a bank. She C had charged the title to the subject property in the bank's favour to secure the loan made to her. Later, she defaulted in repaying the loan. The bank then took steps to apply for an order for sale from the Land Administrator. The Land Administrator made an order for the sale of the subject property at public auction. It is D common ground that the property was auctioned and that a successful bid was made at that auction. Now the person who made the successful bid was one Kerk Chee Kian, the director of the appellant before us. Later still, the full purchase price was paid by the appellant and a certificate issued to it pursuant to E provisions of s. 265(4) of the National Land Code 1965 ("the Code"). In the meantime, the respondent claiming to be the purchaser of the subject property entered a private caveat against its title. The appellant company then applied under s. 327 of the Code to have that caveat removed. It failed. It then appealed to F this court against the decision of the High Court.

[4] In opposing this appeal learned counsel for the respondent has raised two main grounds. The first is that the caveat must remain because the order for sale made by the Land Administrator G was challenged under separate proceedings instituted in December 2006. Now, the short answer to that argument is that the respondent's caveat is not based on the ground now advanced before us. If you look at the Form 19B employed by the respondent to enter his caveat you will find that he relies on the H sale and purchase agreement he entered into with Hau Sok Ngo (f) a beneficiary of the deceased's estate. The caveat is not grounded on the fact that the order for sale is invalid. In *Luggage Distributors Sdn Bhd v. Tan Hor Teng* [1995] 2 CLJ 713, this Court held that a caveator is bound by the grounds he or she I sets out in the application in Form 19B for the entry of the caveat. It was also held that if the grounds disclosed in Form 19B do not disclose a caveatable interest, then *cadit quaestio*.

[5] In the present case the sale and purchase agreement on which the respondent relies to sustain his caveat in truth and fact confers no interest of title on him. The vendor with whom he made the contract was not the registered proprietor of the land. She accordingly had no title to pass. Further as observed by the then Federal Court in *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 the mere payment of the deposit for purchase of a property does not render a purchaser a *bona fide* acquirer of the property. It is to be noted that in *Doshi,* Gill CJ (Malaya) relied on *Morland v. Hales and Somerville* [1911] 30 NZLR 201 as authority when he said this:

> It is said that the respondent cannot claim to be a purchaser for value without notice because he had not paid the full purchase price. The authority relied on for this assertion is the New Zealand case of *Morland v. Hales and Somerville* [1911] 30 NZLR 201 in which it was said that Somerville could not claim as purchaser for value without notice, as his contract had not yet been completed by payment of the purchase price and the conveyance of the legal estate.

[6] There is a further point here. It is conceded by learned counsel for the respondent that the sale and purchase agreement in question was entered into after the Land Administrator made his order for sale. In our judgment once the order for sale had been made, any attempt to deal with the subject property by way of private treaty was futile. The order of sale put the property out of the hands of the deceased's estate. See, *Mui Bank Bhd v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222.

[7] The second ground raised by the respondent in opposition of this appeal is this. The deposit that was paid at the fall of the hammer was not by the instant appellant. It was by its director. The memorandum of contract was originally made in favour of the director. It was later amended to reflect that the appellant as the purchaser. It is the respondent's contention that the Land Administrator was *functus officio* and the sale was therefore bad. With respect we do not agree. The amendment to the memorandum of contract was merely clerical in nature. It did not go to the jurisdiction of the land administrator's power. We may add that this case has nothing in common with *M & J Frozen Food v. Siland* [1994] 2 CLJ 14. In that case, the Senior Assistant Registrar of the High Court purported to grant the purchaser at

A an auction extension of time for payment to be made. This was clearly *ultra vires* his powers under the Code. Hence the Supreme Court had no difficulty to set aside the certificate issued to the successful bidder in that case.

B **[8]** We have here a case where a certificate of sale has been issued to the appellant. That certificate places the appellant in the position of a registered proprietor by virtue of s. 267 of the Code. Since the respondent is unable to show any defect in the certificate so issued and has based his claim for a caveat on an C unsustainable ground, the certificate must stand.

[9] For the reasons already given, we are unable to agree with the orders made by the High Court. This is a case where there is no caveatable interest, no serious question to be tried and one in D which the balance of convenience clearly favours the appellant. The appeal is accordingly allowed. The order of the High Court is set aside. The Land Administrator is directed under s. 417 of the Code to forthwith remove the respondent's private caveat. The respondent must pay the costs of this appeal and those E incurred in the court below. The deposit in court shall be paid out to the appellant to account of his taxed costs.

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